

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN P. CURTIS,

Defendant.

NOS. CR-01-031-RHW
CV-05-147-RHW

**ORDER DISMISSING 28 U.S.C. §
2255 MOTION TO VACATE, SET
ASIDE OR CORRECT
SENTENCE, PURSUANT TO
RULE 4(b)**

Before the Court is Defendant's Motion to Vacate, Set Aside, or Correct Sentence, Pursuant to 28 U.S.C. § 2255, filed on May 16, 2005 (Ct. Rec. 23). In his motion, Defendant contends that (1) his conviction is barred by the Constitutional provision against double jeopardy; and (2) the court applied sentencing enhancements in violation of *United States v. Booker*, 125 S. Ct. 738 (2005).

BACKGROUND

On June 5, 2001, Defendant plead guilty to Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g) and Possession of a Stolen Firearm, in violation of 18 U.S.C. § 922(j). On August 7, 2001, Defendant was sentenced to a 92 month term of imprisonment; a three (3) year term of supervised release; and a \$200 Special Penalty Assessment.

DISCUSSION

A federal prisoner, under 28 U.S.C. § 2255 may move the court to vacate,

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1 set aside or correct a sentence on the grounds that (1) the sentence imposed was in
2 violation of the Constitution or laws of the United States; (2) the court lacked
3 jurisdiction to impose such a sentence; or (3) that the sentence exceeded the
4 maximum authorized by law. Unless the motion, files and records conclusively
5 show the prisoner is not entitled to relief, the court shall cause notice to be served
6 upon the United States Attorney; grant a prompt hearing; determine the issues; and
7 make findings of fact and conclusion of law. 28 U.S.C. § 2255. If it is plainly
8 apparent that the petitioner is not entitled to relief, however, pursuant to Rule 4(b),
9 Rules Governing Proceedings in the United States District Courts, the court may
10 voluntarily, *sua sponte*, dismiss the motion.

11 Section 2255 provides for a one (1) year period of limitation running from
12 the latest of (1) the date the judgment of conviction is final; (2) the date an
13 impediment to making the motion by the government violating the Constitution or
14 laws of the United States is removed; (3) the date which the right asserted was
15 initially recognized by the Supreme Court; or (4) the date which the supporting
16 facts could have been discovered through due diligence.

17 From the face of Defendant's petition, it is clear his petition is untimely. In
18 his motion, Defendant asks the Court to suspend the one year time limitation,
19 citing that he had inadequate financial resources to obtain legal counsel to perfect
20 an appeal, and had only recently discovered that the trial court erred in allowing
21 the case to go forward. He also attributes the delay to the fact that he is a layman
22 and unskilled in the law.

23 Although the statute of limitations contained in § 2255 is subject to equitable
24 tolling, in order to qualify for equitable tolling, Defendant must demonstrate that
25 "extraordinary circumstances beyond [his] control [made] it impossible to file a
26 petition on time and the extraordinary circumstances were the cause of his
27 untimeliness." *United States v. Battles*, 362 F.3d 1195, 1197 (9th Cir. 2004).

28 Defendant's proffered reasons for the delay in bringing his habeas petition do not

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1 meet this “very high threshold.” *Id.*

2 Accordingly, **IT IS HEREBY ORDERED:**

3 1. Defendant's Motion to Vacate, Set Aside, or Correct Sentence,
4 pursuant to 28 U.S.C. § 2255 (Ct. Rec. 31) is **DISMISSED.**

5 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
6 order; provide copies to counsel and Defendant; and **close the file.**

7 **DATED** this 13th day of January, 2006.

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9 s/Robert H. Whaley

10 ROBERT H. WHALEY
11 Chief United States District Judge
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